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"Ignorance of the law excuseth no man.'

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ON THE LAW RELATING TO MASTERS OF SHIPS AND COMMON CARRIERS.—No. I.

IN conformity with the intention expressed in a former essay on the law of Principal and Agent, it is proposed in some degree to complete the outline then presented, by now considering the law relating to Masters of Ships and Common Carriers.

Of those employed as Commercial Agents, few have more various duties to perform, or without express authority, subject their Principals to greater responsibility, than Masters of Ships. While the ostensible and apparently sole object of their appointment is the navigation of the vessels committed to their charge, they are occasionally required to act the part of merchants, and from necessity constituted the legal representatives, not only of the owners of the ship, but sometimes also, of the proprietors of the cargo.

Successfully, or even safely, to execute their trust, various and somewhat dissimilar qualifications are requisite. Nautical skill must be combined with mercantile information. A theoretical and practical knowledge of the art of navigation, is essential to conduct the vessel in safety to its destined port—but even in relation to the navigation of the ship, this knowledge forms but part of the qualifications necessary. Commanding those "whose home is on the deep," and whose habits, uninfluenced by the charms and the charities of domestic life, render them insubordinate and audacious, there is required of the

Master firmness and decision to preserve authority, and enforce discipline, yet so regulated by good sense and moderation, as to prevent authority and discipline from degenerating into tyranny and cruelty. Exposed at times to the attacks of enemies and pirates, courage is necessary to protect the property confided to his care. Storms and tempests are the incidents of his voyage, and to escape disastrous results from encountering them, he must possess presence of mind in time of danger. His courage and self possession should, as has been said by a celebrated French Jurist, (Emerigon,) "be able to dissipate fear, to calm disturbed minds, and inspire confidence in the breasts of the most timid. He should have the talent to command, and enforce obedience to his orders. When the vicissitudes of the voyage require of him to act the part of a merchant, he should possess business qualifications, and be conversant with the forms and course of trades.

But it is not in relation to those and other requisites for his office, that we are now to inquire. It is his character as an Agent—his authority to bind those by whom the ship is owned, to act for the proprietors of the cargo, and especially his liability in common with the owners of the ship, for injuries or losses resulting from his negligence or misconduct, or for which as Carriers the law makes both the Masters and Carriers responsible, which it is proposed to consider.

The authority of the Master to bind the owners is seldom expressly given. It is implied from his appointment, which holds him forth to the world as worthy of trust and confidence. According to the principle stated in a former essay, they are answerable for all his acts, for the performance of which an authority may be presumed from his situation and character, although he contravenes his private instructions. All his lawful contracts, therefore, relative to the *usual employment* of the ship, are obligatory upon his employers, whether they are the absolute owners of the vessel or only the charterers, provided in the latter case, the charterer has the exclusive possession and navigation of the ship. (St. Abt. 23, note.)

Where the ship is a *general one*, that is, not chartered, but employed to carry the goods of a number of persons not con-

nected with each other, the Master when aboard has authority to make contracts relative to the freight. He cannot, however, bind his owners by an agreement to carry goods free of freight, as such an arrangement would obviously not be within the scope of his authority. The Master may also, when the vessel is in a foreign port, where the owners have no Agent, charter her by virtue of his general authority. (2 W. C. C. R. 149.) But if the owners themselves have contracted for the employment of their ship, the Master cannot by the implied authority of his character, alter such contract, or substitute another for it. (11 Mass. R. 99.) Yet so far is he the Agent of the owner, from the mere relation of Master and owner, that where a ship while abroad, was sold by the owners at home, the purchaser was held liable for supplies subsequently furnished upon a contract with the Master, though neither the Master nor the person furnishing the supplies, knew of the sale of the vessel, and consequent change of ownership. (6 Mass. R. 422.)

The power of the Master is not confined to making engagements relative to the *employment* of the ship; he may bind the owners by contracts respecting the *means* of employing and navigating her. To him is usually confided the hiring of the seamen, and the purchasing of the requisite supplies for the voyage. The usage, and his character as Master, furnish presumptive evidence of his being authorized to contract for such purposes, even at the place where the owner resides, and of course much stronger proof of his authority when the ship is abroad. To bind the owners, however, by such contracts, the supplies must appear to be reasonable, or it must be shown, that the money advanced for the purchase of them was wanting. There must also be nothing in the circumstances of the transaction, to repel the presumption, that the Master acted under the authority of the owners.

In the contracts thus made by the Master, the owners are rendered liable; but he is also personally bound to those with whom he contracts, unless by the terms of the contract it is expressly otherwise provided, or unless the circumstances show that credit was given to the owners alone. The Master's authority is not confined to contracts personally obligatory upon

the owners. He may in certain cases create a lien upon the ship, and even hypothecate or pledge the whole, or sell part of the cargo, though owned by strangers.

The most staunch and well found ship may be disabled by gales and tempests; the best planned and most lawful voyage be interrupted by the violence of belligerants, the cupidity of privateersmen, or the unjust and arbitrary acts or edicts of foreign princes. From these and similar causes, the ship and cargo are sometimes, at an intermediate port, where the owners have no authorized Agent, placed in situations of embarrassment and peril. To release them, and prevent the voyage from being broken up, often requires the exercise of an extraordinary authority in behalf of the owners, which as the necessity, for it is rarely anticipated, is seldom expressly given. This authority, where there is no other authorized Agent, the law has vested in the captain. It exists, however, only in cases of necessity, and is to be exercised as a last resource.

Thus, were funds are wanted in a foreign country, though it may be even at the port of destination, (3 Johns, R. 352,) to repair the ship, to purchase provisions, or for any other purpose *necessary to complete the enterprise, in which the vessel is engaged*, whether the necessity has arisen from extraordinary dangers, or in the ordinary course of events, the Master may, *if he cannot obtain it otherwise*, borrow money at maritime interest on bottomry, and pledge the ship and freight for the repayment at the end of the voyage. The terms *bottomry* and *maritime interest*, are familiar to most merchants, but it may not be improper to state their legal acceptation. A bottomry bond is a security, by which the ship and freight are pledged by way of mortgage, for a loan or advance to the Master or owner. It is called *bottomry*, the bottom or keel being figuratively used to denote the whole vessel. The lender generally speaking, takes upon himself the risk of the safe arrival of the vessel. If it is lost, he loses his right to repayment, but in consideration of the risk which he thus incurs, the law allows him to stipulate for, and receive a greater rate of interest, than would otherwise be legal. This is called maritime interest, varying as to its rate, according to the contract of the parties. A respondentia bond

is, where the loan is upon a pledge of merchandise, the condition of repayment being the safe arrival of the goods pledged; the amount loaned, both principal and interest, being at the risk of the lender during the voyage, who is, therefore, also allowed to receive maritime interest.

To return to the authority of the Master to raise money on bottomry at maritime interest. When he does so, as the loan was not on the personal credit of the owner, the owner is not personally responsible. The lender, if the ship arrives safe, must resort to *the specific security* of the vessel and freight, or to the Master upon his personal engagement as the obligor of the bond.

The authority thus given to the Master, to pledge the ship and freight, is intended to promote the interests of the owners, but as being exercised abroad, it may be perverted and abused, the law has endeavoured to guard against such results, and as far as practicable to protect the owner from fraud and collusion, and from the injuries which might follow from an improvident exercise of this power by the Master. For this purpose various safeguards have been established. It has been determined that the Master cannot borrow on bottomry, where the advances are not necessary for repairs or supplies, or for effectuating the objects of the voyage, or the safety and security of the ship—nor where the Master has other funds which he might use—nor where he can borrow on the credit of his owner —nor where the consignees of the owner have funds in their hands.

In these cases, the necessity, which is the sole ground of the authority to borrow, does not exist, and the authority, therefore, is not conferred.

Neither is the Master authorized to hypothecate the ship for advances *previously* made, nor for the debts of his owner. (2 Wash. C. C. R. 145.) It follows of course, that he cannot do so to advance his own private interest—nor can he do it for the benefit of the cargo. (9 Johns, R. 29.)

It is required that the necessity of the loan, if disputed, should be proved by the lender; but if the necessity exists, and he acts fairly, he is not bound to see to the proper application

of the money by the Master, nor affected by his dishonest appropriation of it.

It has been doubted whether the consignee of the ship or cargo, could take a bottomry bond for advances, as it afforded an opportunity for collusion and fraud. But it is now settled, that where a necessity existed for the hypothecation, where the consignee had no funds in his hands, and the fairness of the transaction is established, that the bond being given to a consignee will not affect its validity; though in such cases a court would scrutinize the circumstances of the loan with a jealous eye.

To render a bottomry by the Master valid, the money must have been advanced on the credit of the ship—if it has been lent without a bottomry, and from doubts as to the solvency of the owner or other circumstances, the lender subsequently wishes the further security of the ship, the Master cannot pledge it, though the money borrowed was necessary, and has been applied to the purposes of the voyage.

A ship bound from Philadelphia to Ostend, was obliged to put into Dover in distress, where she was refitted; and the consignees at Ostend being informed by the captain of his situation, furnished him with a credit on London, by which he raised money sufficient to pay the expenses incurred. The ship pursued her voyage to Ostend, where the consignees having accepted bills drawn by the owner beyond the amount of freight and cargo, told the captain he should not leave the port, unless he would repay the money advanced in England for repairs, or hypothecate his vessel. The captain could not repay the money, and for some time refused to hypothecate the ship, but finding expenses to accumulate, he at last consented. The consignees introduced him to another mercantile house, to whom he executed a bottomry bond, but received no money. The vessel returned to Philadelphia; but in the mean time the owner had failed, and had assigned his ship to his creditors. The foreign bond holders libelled the vessel in the admiralty of Pennsylvania; but the distinguished Judge, and accomplished scholar, who then presided in that court, (the late Francis Hopkinson, Esq. whose mantle has so happily fallen upon his son and successor,)

decided that the law never designed in this manner, to give partial advantages in mercantile connexions, or secure the balance of a running account between owners and consignees. That under the circumstances, the captain had not power to hypothecate the vessel to the consignees, and that the hypothecation to the plaintiffs, who were not at all interested in the transaction, and whose names were only used to save appearances, was the same as if made to the consignees. (Hopkins. Adm. Decis. 163.) This decision was appealed from; but was unanimously confirmed by the High Court of Errors and Appeals.

It is a general rule of law, that the Master has no authority to *sell* the ship, and that by such a sale, no interest is vested in the purchaser; but as has been observed by Sir William Scott, (1 Rob. Adm. R. 221,) "laws which will not admit of an equitable construction, to be applied to the inevitable misfortunes or necessities of men, cannot be laws framed for human societies." In cases of extreme necessity, therefore, not only are exceptions to general rules established, but all rules are superseded. The Master, it is true, is appointed only to navigate the ship, and it is evidently beyond his commission to sell, yet in a case of urgent necessity and extraordinary difficulty, his sale made in the exercise of a sound and honest discretion, and for the benefit of all concerned, would be sanctioned. But in the language of Judge Washington, the sale can only be justified in cases of extreme necessity in a foreign country, and to prevent the property from perishing. (2 Wash. C. C. R. 150.) There must be no opportunity of consulting the owner; and the Master must act with the most pure good faith. (St. Abbot. 10. Note.) To evade this prohibition to sell, or to justify their conduct, Masters of ships sometimes obtain a sentence of condemnation of their vessels as unseaworthy, and a decree of sale by some Court of Admiralty; but it is now well settled, that such a decree obtained upon the petition of the Master, and the report of surveyors, that the ship is unseaworthy, or not repairable, is not within the legitimate power or authority of such courts, and that the title of the purchaser at such sale, may be contested by the original owners of the ship, wherever it is subsequently

found, and the facts upon which the decree of sale was founded be disputed by them. Accordingly, in a late case in England, (10 East. 143,) where a ship had put into Tortola, and being leaky, the Master applied for a survey, and upon the surveyor's report, she was, by the Vice Admiralty Court, decreed to be sold; the sale was declared to be invalid in a suit by the owners against the purchaser—the absolute necessity of it not being established, although it appeared to have been made *bona fide*, and intended at the time for the benefit of all concerned.

The Master as such, does not represent the owner of the cargo. His duty is to keep it safely, and convey it to its destined port, and generally speaking, if he exercises any other authority over it, his conduct is unlawful. But in cases of urgent and unforeseen necessity, the character of Agent for the owners of the cargo, is by the policy of the law sometimes cast upon the Master. Were it otherwise, the property might be left without protection, or not reach the intended market. One case in which he is thus authorized to act for the owner of the cargo is, that of ransom from an enemy or pirate. If a part of the cargo is delivered, or a sum of money paid for that purpose by the Master, his act will be justified, and the owners of the ship and other goods be bound to contribute. Ransom from an enemy is prohibited to English subjects by several acts of parliament. (Abbot 347.) The contract is made void, and the party subjected to a penalty. No such prohibition exists in our law, and an instance during the late war of the ransom of a valuable ship and cargo, captured at the Capes of the Delaware, will be recollected by many. So too, the Master may in certain cases pledge the whole of the cargo, or absolutely sell part of it, to raise money for the repairs of the ship, to enable her to proceed to the port of destination. The ground upon which this extraordinary power over the property of those whom he does not expressly represent, is vested in him, is the extreme necessity of the case, and the supposed tacit agreement of the owner of the cargo to such measures as alone will prevent the voyage in which he is equally interested with the owner of the ship, from being broken up, or unreasonably delayed. (2 W. C. C. R. 237.) The Master cannot, therefore, either sell or hypothecate the

cargo, where it is apparent, that the owners of it cannot possibly be benefitted by such an act. A sale of the whole cannot of course be for the advantage of the owner; and the Master, therefore, cannot sell the whole; but a sale of part may be for the owner's benefit, as thereby the Master may be enabled to carry the residue to the destined market. For the same reason, that as thereby the whole may be conveyed to its proper market, he may hypothecate the whole. The part or proportion which he may sell, to enable him to prosecute his voyage, is not fixed by law, nor could it well be. It must depend upon the necessity and circumstances of the case. The only limitation is, that the sale must not be of the whole.

The power to sell or pledge the cargo, can be exercised by the Master only at an *intermediate port*, and not at that of the ship's destination; because the only motive which can justify it, is to enable the ship to prosecute the voyage. Nor can the Master sell part of or hypothecate the cargo even at an intermediate port, and for the purpose of enabling the ship to perform the voyage, unless the ship and freight, and the personal credit of the owner, are not sufficient security for the sum which it is requisite to raise, nor where the owner of the ship or the Master himself has goods on board. These are to be first used to raise money, they form the proper security for the captain to give, and should therefore first be given.

The credit of the owners of the ship, and their property, must be shown to be insufficient, and the necessity urgent, to justify the interference of the Master with the rights of the owners of the cargo. His duty is to carry it to the place of its destination, and there deliver it to the Agent of the owner. If contrary to this duty, and without a sufficient cause, he sells, or pledges it, both he and his owners may be made responsible for the loss sustained, by the proprietor of the goods. Nor will the Master's acting in good faith, excuse him or the owner, or render valid the sale of the goods, if the absolute necessity of the measure cannot be clearly made out.

The same urgent necessity, (which according to the maxim, has no law,) has been held to justify the Master, without reference to the repairs of the ship, or the prosecution of the voyage,

in selling at an intermediate port, where there is no authorized Agent of the shipper, goods which were damaged, or of a perishable nature. In a case decided by the Supreme Court of Pennsylvania, the ship by stress of weather had been driven into a port out of her course. Part of the cargo, consisting of saltpetre, being damaged by sea water, the vessel being condemned as unseaworthy, there being no supercargo on board, nor Agent of the owners at the port, the captain sold the *entire* cargo. He was sued by the owners of the saltpetre, who contended, that as the article, though damaged, was not perishable, it should have been stored, and that the sale was unlawful. The *expediency* of the sale having been established by the verdict of the jury, the court decided, that the Master could lawfully make it on the grounds before stated. But in the same case it was ruled, that though the ship was condemned as unseaworthy, those goods which were in good condition, and not perishable, the Master had no right to sell without the order of the owner, to whom he was bound to give immediate information. (6 Binney 262.) Under such circumstances, the Master should either tranship the goods, if he has the means of so doing —if not, deposit them until instructions are received, or return them to the owner. The transhipment if practicable, would generally be the most correct course. A sale, where the goods are not damaged or perishable, can scarcely be justified by any circumstances—nor will it excuse, that it was made under the order of a Court of Admiralty, upon the application of the Master, if in fact the necessity to sell did not exist.

The owners of a ship are not only liable for the contracts and engagements of the Master, while acting within the scope of his employment, but they are also in certain cases responsible for injuries done to the property of others, by his want of care or of skill in the management of his vessel. Both Master and owners are bound to all who may be affected by his acts, for his skill and care in the navigation of his ship. Therefore, where a vessel is run down or injured by another, the owner as well as the Master of the vessel, by which the injury is done, are liable in damages to the full extent of the injury, if it proceeded from want of attention, or of nautical skill on the part

of their captain, or was wilfully done by him. (1 Wash. C. C. Rep. 142.) The difficulty generally is, to discover to which party the blame is imputable. There are, however, settled nautical rules, by which in many cases it may be ascertained. Thus the vessel that has the wind free, must get out of the way of one that is close hauled—and where a vessel is entering a harbour, where others are anchored, neglect to check the course of the entering vessel, will be a fault creating responsibility for the damages which may ensue. If the collision happened without any negligence or fault, but from the violence of the wind or other physical cause, the damage must be borne where it falls. (3 Kent. Com. 184.) The Supreme Court of Pennsylvania has decided, (4 Dallas, 206,) that the owner is also liable for such an injury committed, while his vessel was in charge of a regular pilot, on the ground that the pilot was in the actual service of the owner of the ship. But it seems the better opinion, that the *Master* is not answerable, while the ship is under the direction of the pilot, for injuries done to other vessels by collision. (1 John, R. 105.) In England by an act of parliament lately passed, (6 George IVth, c. 107,) both owners and Masters are exempted from liability for injuries to others, by reason of the neglect, incapacity, or default of a licensed pilot, while the vessel is under his charge. No similar statutory provisions are known to exist in the United States.

For personal violence to his crew, or the maltreatment of his passengers, the captain alone is answerable, and not the owners. In relation to the crew, the law while it vests in the Master the power of enforcing discipline, by confinement or personal chastisement, when milder measures are not sufficient, punishes by damages all undue severity. As to passengers, it requires that his behaviour towards them should be decorous, and that they should receive all the accommodations stipulated for by their contract. In respect to them, to use the language of Judge Story in a recent case, (3 Mason, 245,) the duty of the Master is one of responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board, but for reasonable food, comforts, necessaries, and kindness. It is a stipulation not for toleration merely, but for respectful treat-

ment, for that decency of demeanour which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In the case referred to, where the conduct of the captain had been harsh and indecorous to passengers in his ship, consisting of a family, some of the members of which were females, the learned judge upon proceedings instituted in the Admiralty, decreed 400 dollars damages against the captain.

THE CHURCH PENITENTIARY SYSTEM.

It has been the fashion with many historians, to indulge in severe strictures on the spirit of domination in the Catholic Church, during the middle or dark ages, and on its fostering superstition and ignorance among the people, the better to keep them in subjection. That these accusations are not destitute of proof, we will not take upon us to deny; but surely, the brighter parts of the picture ought not to be concealed, in which the ameliorating spirit of christianity never ceased its endeavours to soften the asperities of barbarism, and to bring men back to a better standard of individual morality and social support. A popular lecturer on modern history,* who certainly cannot be accused of undue bias to the church, will supply us with direct evidence on this subject. When discussing the relations between the church, (by which he understands the entire ecclesiastical body of christendom,) and the people, from the fifth to the twelfth centuries, he dwells with some emphasis on its efforts to mitigate the evils of slavery, and improve both criminal and civil legislation. He contrasts the laws of the christianized Visigoths, in a great measure emanating from the council of Toledo, with those of the other barbarous people, and shows the immense superiority of the former over the latter, in legislation, justice, and whatever interests in the search after truth and the destiny of man. But what more especially concerns our present purpose, is his opinion respecting the church penitentiary system,

* Mr. Guizot—Cours d'Histoire Moderne—Paris, 1828.

which he declares to be, as far as respects principles and applications to penal law, almost completely in accordance with the ideas of modern philosophy. "If," says Mr. Guizot, "we pay attention to the punishments inflicted by the church, and to the public penances which were its chief means of correction, we shall find, that their leading object was to create repentance in the heart of the culprit, and the moral terror of example in the breast of the spectators." There is also, blended with all this, an idea of expiation. "I do not know," he continues, "in the abstract, whether it be possible to separate the idea of expiation from that of punishment, and whether there be not in every punishment, independently of the necessity of giving rise to repentance on the part of the guilty, and of deterring those who might be tempted to become so, a secret and imperious desire to expiate the wrong done; but waiving this point, it is evident, that repentance and example are the end proposed by the church in its penitentiary system. Is not this also, the object of a truly philosophical legislation? Is it not in the name of these principles that, both in the last century, and at the present day, the most enlightened publicists have called for a reform of European penal legislation? If you open their books, those of Bentham, for example, you will be astonished at the resemblance which you will discern between the penal methods, which they proposed, and those employed by the church. They certainly did not borrow them from the latter; and the church could not well have foreseen, that the day would come, when her example would be invoked in favour of the plans of the least pious of the philosophers.

BURKE'S OPINION OF ENGLISH COURTS OF JUSTICE.

We insert the following as a curiosity not generally known.

Extract from a Letter written by Edmund Burke, *to French Laurence, dated 15th February*, 1797.

"—— But no wonder, that such villains as Owen should proceed as they do, when our Courts of Justice seem by their

proceedings, to be IN LEAGUE WITH EVERY KIND OF FRAUD AND INJUSTICE. They proceed, as if they had an intricate settlement of ten thousand a year to discuss, in an affair that might as well be decided in three weeks, as in three hundred years. They let people die, while they are looking for redress; and then all the proceedings are to begin over again, by those who may think they have an interest in them. While one suit is pending, they give knaves an opportunity of repeating their offences, and laughing at them and their justice, as well they may. I wish heartily, that if the lawyers are of opinion that they may spin out this mockery a year or two longer, I may not vex my dying hours in chicane, but let THE VILLANY WHICH THEIR MAXIMS COUNTENANCE, take its course. As to any relief in the OTHER COURTS," (he had been speaking of the Court of Chancery,) "I have been in them, and WOULD NOT TRUST THE FAME AND FORTUNE OF ANY HUMAN CREATURE TO THEM, IF I COULD POSSIBLY HELP IT. I have tried their justice in two cases of my own, and in one, in which I was concerned with others in a public prosecution, where they suffered the House of Commons in effect, to have the tables turned on them, and under colour of a defendant, to be criminated for a malicious prosecution. I KNOW THEM OF OLD, and am only sorry at my present departure, that I have not had an opportunity OF PAINTING THEM IN THEIR PROPER COLOURS. —— But I allow, that it is better that even this kind of justice should exist in the country, than none at all."

A PIOUS LITIGANT.

THE affectation of piety sometimes assumes strange forms. It is related of the Duc de Mazarin, (husband of the celebrated Hortense Mancini,) that a proposition was once made to him, by his adversary in a very important law-suit, for a compromise of the controversy by way of reference. The friends of the Duc urged his acquiescence in the proposal, which appeared to them highly advantageous to his interests,—but he positively refused in these words—"Our Saviour came into the world not to bring peace, but a sword; controversies, disputes and law-

suits, are mentioned in the Sacred Book, but compromises by way of reference, are mere human inventions: God established judges, but seems never to have thought of arbitrators, for not a word is said about them in the Bible; therefore, I am resolved to carry on my law-suit for my life time, if necessary—for I never can, as a religious man, consent to a reference." Which determination he faithfully adhered to.

The same conscientious personage, had promised the Bishop of Frejus fifty thousand crowns, if he would forward his marriage with Hortense Mancini, already mentioned, who was the favourite niece of Cardinal Mazarin, and whose hand was therefore attended by a princely fortune. The episcopal functionary, accordingly, devoted himself heart and soul to the cause, and with such success, that the marriage was at length completed. But when the innocent bishop sent to the bridegroom for his fifty thousand crowns, the devout Duc returned for answer—"My weak human nature indeed strongly urges the payment, but my religion compels me to refuse it, since my Director has apprised me, that to give money for the sacrament of matrimony, would be highly sinful, and as clear Simony, as buying a bishopric."

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After a careful examination of this work, we cordially recommend it to the patronage of the public, as a highly useful compilation.

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